

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH FISHER	:	DETERMINATION
	:	DTA NO. 819419
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Year 1996.	:	

Petitioner, Joseph Fisher, 47 McKeever Place, Brooklyn, New York 11225-2541, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1996.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 24, 2004 at 2:45 P.M., with additional documents due by June 25, 2004, which date began the three-month period for the issuance of this determination. Petitioner appeared by Garry:Webb:Bey. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

ISSUE

Whether the Division of Taxation properly assessed petitioner additional income taxes for the year 1996.

FINDINGS OF FACT

1. Pursuant to a report of income tax examination changes prepared by the Internal Revenue Service ("IRS"), it was determined that petitioner, Joseph Fisher, had failed to file a

1996 Federal income tax return. Upon the Federal audit, it was determined further that petitioner had income before deductions of \$25,379.00. After allowances for a standard deduction and exemptions, petitioner was assessed additional Federal income tax of \$2,824.00.

2. On or about May 14, 1999, the IRS shared this information with the Division of Taxation ("Division") which then searched its records and discovered that petitioner had not filed an income tax return for 1996.

3. Utilizing the Federal adjusted gross income of \$25,379.00, the Division allowed for a New York standard deduction of \$7,400.00 to arrive at New York taxable income of \$17,979.00. This yielded New York State tax of \$999.00, after a \$20.00 household credit, and New York City resident tax of \$646.00. The total of the two taxes was \$1,645.00.

4. On June 14, 2001, the Division issued to petitioner a Statement of Proposed Audit Changes in which it informed petitioner that it had received the Federal audit changes, had found that he had filed no New York return for 1996 and informed him that his New York State and City tax liability had been calculated from the Federal information. The statement set forth additional New York State tax due of \$999.00, New York City tax of \$646.00, plus penalty pursuant to Tax Law § 685(a)(1) and interest for late payment or underpayment. The statement set forth a total balance due of \$2,650.94. The statement advised petitioner that he could submit his wage and tax statement to get credit for any taxes withheld.

5. On August 13, 2001, the Division issued to petitioner a Notice of Deficiency which set forth additional New York State and City income tax due for the year 1996 in the sum of \$1,645.00 together with penalty and interest, totaling \$2,674.13.

6. At hearing, the Division's advocate disclosed that the Division had searched its records and found that \$520.00 had been withheld from petitioner's wages in 1996 and that the Division

conceded that the Notice of Deficiency should be modified to reflect that the remaining tax due was \$1,125.00.

7. On April 1, 2003, petitioner paid the remaining 1996 income tax liability in full and now claims a refund of the amount paid.

CONCLUSIONS OF LAW

A. Tax Law § 659 provides that if the amount of a taxpayer's Federal taxable income reported on his Federal income tax return for any taxable year is changed or corrected, the taxpayer shall report the change or correction within 90 days after the final determination of such change or correction. If a taxpayer fails to comply with this provision of Tax Law § 659, the Division is authorized to assess the additional tax due at any time. (Tax Law § 683[c][1][C].) As detailed in the facts, the Division properly issued a notice of deficiency for additional income tax due based upon the information it received from the IRS, after petitioner failed to notify the Division of the change within 90 days.

B. In challenging the Division's assessment, petitioner bore the burden of proving by clear and convincing evidence that the deficiency assessment was erroneous (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 769, *lv denied* 81 NY2d 704; Tax Law § 689[e]). Petitioner's failure to produce any evidence demonstrating that the assessment was erroneous leaves intact "the presumption of correctness which attached to the notice of deficiency" (*Matter of Leogrande v. Tax Appeals Tribunal, supra*, at 769, quoting *Matter of Kourakos v. Tully*, 92 AD2d 1051, 1051-1052, *appeal dismissed* 59 NY2d 967, *lv denied* 60 NY2d 556, 699, *cert denied* 464 US 1070).

C. Petitioner offered no proof of his compliance with the requirements of Tax Law § 659, and although he claimed that he filed his 1996 return, he offered no proof of said filing.

D. The petition of Joseph Fisher is denied, the Notice of Deficiency, dated August 13, 2001, is sustained except as adjusted and petitioner's claim for refund of personal income tax is denied except for such adjusted amount (*see*, Finding of Fact "6").

DATED: Troy, New York
August 12, 2004

/s/ Joseph W. Pinto, Jr.
PRESIDING OFFICER